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Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Implementation of Sections of )  
the Cable Television Consumer )  
Protection and Competition Act )  
of 1992 )

MM Docket 93-215

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REPLY OF BELL ATLANTIC<sup>1</sup>  
ON PETITIONS FOR RECONSIDERATION

As Bell Atlantic and others previously demonstrated, the cable TV and telephone industry are rapidly converging and to an ever increasing degree using the same technologies to deliver the same mix of services. As the Commission itself previously recognized, the result of this is that cable companies and telephone companies should be expected to achieve comparable rates of productivity growth, and expert testimony submitted by Bell Atlantic supports this conclusion. While the cable industry argues that the Commission should nonetheless affirm its decision to give preferential treatment to cable companies by adopting a lower productivity offset for cable, its arguments are without merit.

First, cable claims that Bell Atlantic's reconsideration petition repeats points from its prior filings, and

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<sup>1</sup> The Bell Atlantic telephone companies are Bell Atlantic - Delaware, Inc., Bell Atlantic - District of Columbia, Inc., Bell Atlantic - Maryland, Inc., Bell Atlantic - New Jersey, Inc., Bell Atlantic - Pennsylvania, Inc., Bell Atlantic - Virginia, Inc., and Bell Atlantic - West Virginia, Inc.

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should be rejected.<sup>2</sup> But the cable industry fails to point out that the Commission's order does not address the issues previously raised by Bell Atlantic.<sup>3</sup> Nor does the order explain the Commission's abrupt reversal of its own prior conclusion that an offset similar to that imposed on telephone companies is warranted for cable.<sup>4</sup> Under these circumstances, Bell Atlantic's petition was filed to provide the Commission an opportunity to address these issues in the first instance before an appeal is taken. This type of practice not only is permissible, but is strongly encouraged.<sup>5</sup>

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<sup>2</sup> See NCTA Opposition to Bell Atlantic Petition for Reconsideration at 3 (Dec. 15, 1994).

<sup>3</sup> Rather than burdening the record by repeating these same points here, Bell Atlantic's previous arguments are incorporated herein by reference. See Comments of Bell Atlantic, MM Dkt 93-215 & CS Dkt 94-28 at 2-6 (July 1, 1994); Reply Comments of Bell Atlantic, MM Dkt 93-215 & CS Dkt 94-28 at 2-10 (Aug. 1, 1994).

<sup>4</sup> See Implementation of Sections of the Cable Act of 1992: Rate Regulation, 9 FCC Rcd 4527, 4688 (1994) ("Cable operators should reasonably be expected to achieve productivity gains in the future analogous to those historically realized by other communications firms."); see also Bell Atlantic Pet. at 2-7 (reciting procedural history).

<sup>5</sup> See, e.g., United States v. FCC, 707 F.2d 610, 619 (D.C. Cir. 1983) (argument that the Commission failed to provide adequate explanation for its ruling should not be raised for the first time during appellate review).

Second, the cable industry readily concedes that the Commission "must treat similarly-situated entities similarly."<sup>6</sup> In fact, this is required not only to pass muster under administrative law standards, but also to pass muster under constitutional equal protection standards -- particularly in situations such as this where the Commission's rules will directly affect the ability of regulated companies to upgrade their networks in order to provide video programming and other types of speech.<sup>7</sup> And while it is true that legitimate differences should be taken into account,<sup>8</sup> Bell Atlantic and others previously demonstrated that none of the so-called differences cited by cable warrant preferential treatment in

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<sup>6</sup> NCTA Opp. at 11; see also Nolan, C., "The Common Ground," Cablevision at 50 (Sept. 19, 1994) (quoting NCTA attorney Philip Verveer) ("Whatever they're [the FCC] going to do for video dialtone, they're going to have to do for cable. As a policy decision, it's exactly the same question."); Jessell, H., "FCC Cold Toward Rate Hike For Upgrades," Broadcasting & Cable at 15 (Nov. 21, 1994) (quoting TCI attorney Philip Verveer) ("What they [the FCC] do for telephone, they have to do for cable.").

<sup>7</sup> As the Supreme Court has made clear, under the equal protection clause, laws and regulations "are subject to a higher level of scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech..." See, e.g., Regan v. Taxation With Representation, 461 U.S. 540, 547 (1983) (citing Harris v. McRae, 448 U.S. 297, 322 (1980)).

<sup>8</sup> For example, the Communications Act takes such differences into account in that it bars the Commission from imposing cable regulation under Title VI on common carrier services, see National Cable Television Ass'n v. FCC, 33 F.3d 66 (D.C. Cir. 1994), and bars the Commission from imposing common carriage obligations on cable operators to the extent they provide traditional cable service, see 47 U.S.C. § 541(c).

terms of whether the price cap plan for cable includes a productivity offset.<sup>9</sup>

Specifically, cable claims it should receive preferential treatment because it is not a utility and cable service is not a necessity.<sup>10</sup> This is merely a rehash of cable's argument that it should not be subject to any form of rate regulation -- an argument it lost in 1992 when Congress directed the Commission to regulate cable rates to protect against the exercise of market power.<sup>11</sup> Likewise, cable points out that traditional cable operators are not common carriers and cannot be regulated as common carriers.<sup>12</sup> But including a productivity offset in cable's price cap formula will not subject cable operators to common carriage obligations or any other requirements unique to common carriage regulation.<sup>13</sup> And to the extent cable relies on the fact that it historically was not regulated while the telephone industry was heavily regulated,<sup>14</sup> it ignores the fact that the 1992 Act directed the Commission to

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<sup>9</sup> See, e.g., Bell Atlantic Reply at 3-7.

<sup>10</sup> NCTA Opp. at 5.

<sup>11</sup> Id. at 5, n.12; see also Speech by Chairman Reed E. Hundt Before the Washington Cable Club at 2 (Dec. 20, 1994) (explaining that the Cable Act was passed after "[c]onsumers began to feel that cable was not an option but was a necessity among their monthly purchases...[a]nd prices began to go up far faster than inflation.").

<sup>12</sup> NCTA Opp. at 5.

<sup>13</sup> Bell Atlantic Reply at 7.

<sup>14</sup> NCTA Opp. at 11.

regulate cable rates to protect consumers from cable's exercise of its market power.<sup>15</sup>

Third, on the issue of whether the cable industry's rate of productivity growth is comparable to that of telephone companies, the cable industry relies principally on its claim that there is insufficient evidence in the record to conclude that comparable offsets are appropriate.<sup>16</sup> But as cable itself emphasizes, when the Commission concluded in previous proceedings that there was an insufficient record to set an offset for telephone companies, the Commission performed its own studies to determine an appropriate offset.<sup>17</sup> Likewise, prior to the present order, the Commission made clear that it would not reward the cable industry for its own intransigence in failing to provide adequate data.<sup>18</sup> As a result, cable's own argument merely serves to emphasize the disparate -- and preferential -- treatment afforded by the Commission to cable companies.

Moreover, the cable industry is wrong to the extent it also suggests that the record would support adopting a zero offset for cable while retaining a higher offset for telephone companies. As explained in previous filings and expert testimony, the only empirical study it relies on is subject to

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<sup>15</sup> Bell Atlantic Reply at 4-5.

<sup>16</sup> NCTA Opp. at 5-8, 12.

<sup>17</sup> See Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786 at ¶ 77 (1990); see also Bell Atlantic Petition at 11.

<sup>18</sup> See 9 FCC Rcd at 4688; Bell Atlantic Petition at 6-7.

critical limitations in the data on which it is based.<sup>19</sup> First, the cable industry study is based entirely on a small sample of three unnamed cable companies and there is no evidence that the sample is representative of the entire industry. Second, the study is based solely on a single measure of output and would produce drastically different results if modified to incorporate additional measures.<sup>20</sup>

In fact, the one fact that the current record does establish is that if the rate of productivity growth for telephone companies and cable companies is measured in a comparable manner by examining more than a single measure of output, the results are also comparable.<sup>21</sup> As explained in the expert testimony submitted by Bell Atlantic, this is true regardless of whether the study for cable companies is modified

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<sup>19</sup> See Bell Atlantic Reply at 9-10 and attached Declaration of Robert G. Harris at 3-9.

<sup>20</sup> The authors of the study take issue with expert testimony submitted by Bell Atlantic explaining that the results may be biased either: a) because of the small size of the sample, b) because the cable companies that provided data for the study were self-selected by the cable industry, or c) because the study is based on a single measure of output and may have produced a different result if other measures of output were taken into account. See NCTA Opp. at Att. A. Nonetheless, the authors do not provide evidence to show that the results are not biased as a result of one or more of these factors, or show how the results would differ if the study were modified to include a broader sampling of the industry or to include additional measures of output. Nor could they reasonably be expected to do so given the very limited information provided to them by the cable industry.

<sup>21</sup> Bell Atlantic Reply at 9-10 and attached Harris Decl. at 9-10.

to use procedures comparable to productivity studies of the telephone industry, or vice versa.<sup>22</sup>

While the authors of the cable productivity study take issue with the comparison set out in the expert testimony submitted by Bell Atlantic, they miss the point.<sup>23</sup> That testimony does not argue for a substitute measure of output for the cable industry as they suggest, but rather for the inclusion of additional measures of output. This is necessary because cable output does not vary solely in terms of the number of subscribers connected to the network, but also in terms of the services delivered over the network to existing subscribers. In fact, the authors of the cable study readily acknowledge that cable revenues will increase with an increase in the number of channels delivered to existing subscribers, and may vary further if additional measures of output such as advertising, installation and equipment rental were included.<sup>24</sup> While they suggest that including these additional measures in the study might produce a rate of productivity growth less than that estimated in the expert testimony submitted by Bell Atlantic,

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<sup>22</sup> Id.

<sup>23</sup> See NCTA Opp., Att. A at 4.

<sup>24</sup> Id., Att. A at nn.2, 3.

they again are unable to quantify the difference because of limitations in the data provided by the cable industry.<sup>25</sup>

In short, rather than justifying disparate treatment, the only evidence currently in the record strongly suggests that the rate of productivity growth for cable companies and telephone companies is comparable and requires that the Commission provide equivalent treatment to both.

Respectfully submitted,



Michael E. Glover  
Edward Shakin  
1710 H Street, N.W.  
8th Floor  
Washington, D.C. 20006  
(202) 392-1082

Edward D. Young, III  
Of Counsel

Attorneys for the Bell Atlantic  
Telephone Companies

December 30, 1994

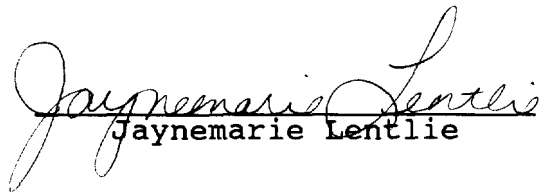
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<sup>25</sup> Moreover, even if the estimated cable offset of 3.5 percent reflected in the expert testimony submitted by Bell Atlantic were reduced by half when more precise data from the cable industry is factored in, it would still support an offset comparable to that for telephone companies.



CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Reply of Bell Atlantic on Petitions for Reconsideration" was served this 30th day of December, 1994, by first class mail, postage prepaid, on the parties on the attached list.

  
Jaynemarie Lentlie

Mary McDermott  
Linda L. Kent  
U.S. Telephone Association  
1401 H Street, N.W.  
Suite 600  
Washington, D.C. 20005

Philip V. Permut  
William B. Baker  
Michael K. Baker  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

Judith A. McHale  
Discovery Communications, Inc.  
7700 Wisconsin Avenue  
Bethesda, MD 20814

Daniel L. Brenner  
Neal M. Goldberg  
Diane B. Burstein  
NCTA  
1724 Massachusetts Avenue, N.W.  
Washington, D.C. 20036

ITS, Inc. \*  
1919 M Street, N.W.  
Room 246  
Washington, D.C. 20554

\* BY HAND